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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 220

LAMB ENTERPRISES, INC., et al.,
Petitioners,

vs.

THE TOLEDO BLADE COMPANY, et al.,
Respondents.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Sixth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS
THE TOLEDO BLADE COMPANY,
COX BROADCASTING CORPORATION AND
BUCKEYE CABLEVISION, INC.

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 339

LAMB ENTERPRISES, INC., *et al.*,
Petitioners,

vs.

THE TOLEDO BLADE COMPANY, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS THE TOLEDO BLADE COMPANY, COX BROADCASTING CORPORATION AND BUCKEYE CABLEVISION, INC.

OPINION BELOW

The District Court for the Northern District of Ohio, Eastern Division did not render an opinion. The opinion of the Court of Appeals for the Sixth Circuit is fully set forth in the Appendix of the Petition and is reported at 461 F.2d 506 (6th Cir. 1972).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Where two persons compete to get into a natural monopoly business, is the success of one to the exclusion of the other a *per se* violation of the antitrust laws?

The trial court answered this question "No."
The Court of Appeals answered "No."
Respondents contend the answer should be "No."

2. Is it error to exclude evidence of an intent to influence legislation, as expressly permitted by the First Amendment, where the trial court finds that the admission of such evidence would unduly prejudice the defendants?

The trial court answered this question "No."
The Court of Appeals answered "No."
Respondents contend the answer should be "No."

STATUTES INVOLVED

Sections 1 and 2 of United States Code, Title 15, commonly known as the Sherman Antitrust Act are adequately set forth in the Petition at p. 2.

The claim brought under Section 7 of the Clayton Act, and found against petitioners by the jury, has apparently been abandoned.

COUNTERSTATEMENT OF THE CASE

This is a private antitrust suit in which petitioners (Lamb) claim he was excluded from the community antenna television (CATV) business in Toledo, Ohio, as the proximate result of the violation of the antitrust laws by some or all of the respondents.

Petitioners in this case are owned or controlled directly or indirectly by Edward Lamb of Toledo, and his family. Mr. Lamb and his family have been engaged in the opera-

tion of radio and television stations for many years and recently have become involved in the operation of CATV systems (Stips. 5, 6, and 8; A. 42 and 43).

Respondent The Toledo Blade Company (Blade) is an Ohio corporation which owns and publishes THE BLADE and THE TOLEDO TIMES, which are daily newspapers of general circulation in the Greater Toledo area (Stips. 10 and 12; A. 44).

Respondent Cox Broadcasting Corporation (Cox) and its subsidiaries have interests in various CATV systems in 14 states (Stip. 18; A. 44).

Respondent Buckeye Cablevision Company (Buckeye) was organized by Blade and Cox to furnish CATV service in the Greater Toledo area and is now owned 80% by Blade and 20% by Cox (Stips. 21, 22, 23, and 24; A. 45).

This case arises in the context of a competitive struggle between Lamb and Buckeye to be first to get into the CATV business in Toledo. To be first into business is crucial in CATV because once established, a CATV system is, as a practical matter, a natural monopoly in the area in which it is established. This fact was established at the trial by the testimony of both Lamb's expert, Mr. Malarkey (T. 2198-2199), and Respondents' expert, Mr. Lahey (T. 2974).

Each competitor, realizing the importance of being first in business, strove in its own way to be first. Buckeye readily admits it desired to be first. Likewise, Lamb in his complaint avers that Bell agreed to give him priority (A. 7). Mr. Kemp, a Lamb employee, testified that, in answer to an inquiry he made when he first discussed lease-back with Bell in February, 1965, representatives of the telephone company assured him of priority if Lamb were the first to place an order (T. 851) and further advised him that if another party had a "pole-contact"

arrangement, Bell would take care of the lease-back order of Lamb first (T. 852).

At some point Lamb chose to abandon the competition and filed the instant suit. The complaint filed by Lamb contained a number of claims, but the only one seriously pursued was a claim that the Respondents or some of them entered into a conspiracy to preclude Lamb from entering the CATV business in Toledo. This claim presented questions of what the Respondents did and the intent with which these actions were undertaken. The facts relating to these questions were presented in a jury trial which lasted some five weeks and the jury found that no conspiracy existed. It is not necessary to chronologue these facts because they are set forth in great detail in the opinion of Court of Appeals for the Sixth Circuit. However, it should be emphasized that this was a fact case, a case in which the evidence was in conflict and the inferences to be drawn were in sharp dispute. The jury resolved all the fact issues in Respondents' favor.

The Petitioner ignores the jury verdict and makes frequent reference to "the undisputed evidence." For example, Lamb asserts in the Petition that Bell's decision that should shortages of material or labor develop it would give construction priority to Lamb in his 30-mile system and Buckeye in the rest of Toledo was made as a result of inducements or coercion on the part of Buckeye. This assertion ignores the fact that convincing evidence to the contrary was believed by the jury. This decision was made on the basis of what the respective competitors had done to that point. At the time the decision was made, Buckeye had already indicated on a map of Toledo the areas of the City it wished to serve with an 11-mile system and had divided this area into ten segments to show the sequence in which the area was to be constructed (A. Vol. II 2; A. 99-100). Lamb, on the other hand, had

indicated only that he wished to serve a 30-mile area in East Toledo by means of a 5-mile system (A. 335-336; Bell Ex. DD). In addition, the various letters and other documents written by the two competitors indicate that Buckeye early in its dealings with Bell determined what areas of Toledo it wished to serve and proceeded on this basis while Lamb vacillated, changed his mind at least once, and finally selected the 30-mile segment for which he received priority in the event of shortages and which he could have used as the start of a viable business had he not reached the business decision to abandon the venture.

Lamb's statement of the case suggests that Lamb had decided to go into the CATV business, had entered into some sort of agreement with Bell to purchase lease-back service, and *then* Buckeye decided to go into the CATV business in Toledo. To the contrary, the evidence showed that on February 3, 1965, the formation and intended business of Buckeye as well as its parentage was announced in the BLADE newspaper (B-B Ex. D; A. 273). On February 12, 1965, Lamb, for the first time, expressed to Bell an interest in Toledo and informed representatives of Bell that he had "decided to compete with the Toledo Blade" for cable television service in Toledo (Bell Ex. 6; T. 2485; A. 99). Lamb then changed his mind and on February 19 notified Bell that he had decided not to wire Toledo at that time (Bell Ex. 6; A. 310-313; T. 2487-2490).

On March 3, 1965, Buckeye filed with Toledo City Council its request for a franchise, notice of which appeared in the newspapers (B-B Ex. C). On March 15, 1965, Lamb filed a similar request (T. 427) and on the following day Lamb advised Bell that he had again changed his mind and was again interested in a proposal for a cable television system for Toledo (T. 2494-2495).

The jury resolved all factual and inferential disputes

in Respondents' favor. Petitioner argues, however, that Respondents have violated the antitrust laws simply by succeeding, in competition with Petitioner, in getting into business in a natural monopoly situation, i.e., that an intent to succeed in a natural monopoly business necessarily implies an intent to exclude others in violation of the antitrust laws. This argument has no basis in law or in economic theory.

REASONS FOR DENYING THE WRIT

1. THE DECISION IN THE COURT BELOW IS CONSISTENT WITH THE RULE LAID DOWN BY THE COURT OF APPEALS FOR THE FIRST CIRCUIT IN UNION LEADER CORP. V. NEWSPAPERS OF NEW ENGLAND, 284 F.2d 582 (1960).

Lamb, in his vain attempt to show a conflict between the decision of the Court of Appeals for the Sixth Circuit in the instant case and the Court of Appeals for the First Circuit in *Union Leader Corp. v. Newspapers of New England,* 284 F.2d 582 (1st. Cir. 1960), has seriously misstated the dicision reached by the court below in this case and has described erroneously the holding in *Union Leader.* The court below simply held that one who succeeds in getting into business first in a natural monopoly situation has not, by virtue of his success, or his intention to succeed, committed a *per se* violation of the antitrust laws. The court did not, as Lamb argues, hold that the presence of a natural monopoly permits any type of conduct or action undertaken with exclusionary or predatory intent by a competitor seeking to get into business. Such of course is not the law and was not held to be the law by the court below. This is made abundantly clear by these statements of the court:

"It is a per se violation of the anti-trust laws to enter into a price-fixing arrangement, *International Salt Co. v. United States,* 332 U.S. 392, 396 (1947), or to engage in a group boycott, *Klors v. Broadway-Hale Stores,* 359 U.S. 207 (1959), or to eliminate, by joint collaborative action, discounters from access to the market, *United States v. General Motors Corp.,* 384 U.S. 127, 145 (1966). However, the Supreme Court has never held that one who succeeds in a natural monopoly siutation, in the face of competition, has committed a per se violation of the anti-trust laws."

* * * *

"We need only decide, and we do, that the circumstances of this case do not rise to a per se violation of the anti-trust laws. Here the jury found specially that the defendants did not enter into any conspiracy the purpose of which was to preclude Lamb from entering the CATV business in the greater Toledo area.

"In a natural monopoly situation any successful competitor gets the market. Thus, it cannot be 'unreasonable, per se, to foreclose competitors from any substantial market.' *United States v. Griffith,* 334 U.S. 100, 107 (1948), where such foreclosure is the natural result of success in a natural monopoly situation."

The court below well recognized that in a natural monopoly context a competing party *could* engage in acts with the exclusionary intent necessary to prove a violation of the antitrust laws. However, in this case the question of exclusionary intent was settled by the jury in the trial court. Special Issue No. 1 as presented to the jury asked:

"Special Issue No. 1:

"Do you find from a preponderance of the evidence that during the period between January 26,

> 1965 and March 23, 1966, the defendants Blade, Buckeye, Cox, and Bell, or any combination with each other, entered into a combintion, contract or conspiracy, the purpose of which was to foreclose, prevent, or preclude plaintiffs Lamb from entering the community antenna television business in the Greater Toledo area?"

The jury answered this issue, "No."

Moreover, after a careful review of the evidence, the court below held: "In our opinion this finding was the only one which the jury could properly make under the evidence."

The decision by the court below is completely consistent with the decision in *Union Leader Corp. v. Newspapers of New England*, 284 F.2d 582 (1st Cir. 1960). In *Union Leader* the court considered a competitive situation in which two newspapers, the Gazette (the established paper) and the Haverhill Journal, published by the Union Leader Corp. (the attempted new entrant under the name "Union Leader") were engaged in a struggle for economic supremacy in a one-newspaper town. The Union Leader sued the Gazette, which counterclaimed. The trial court gave judgment against Union Leader on the counterclaim against it. This was affirmed. The trial court held against Gazette on Union Leader's complaint. This was reversed. The First Circuit, in reversing the trial court, held that intending to succeed in this economic situation and in fact succeeding did not constitute a violation of the antitrust laws.

With respect to Union Leader's conduct in attempting to enter the market, the court held that intending to succeed in a struggle in which only one could survive did not imply an unlawful intent:

"It was a foregone conclusion that if successful the Journal would eventually drive the Gazette out of business, and, naturally, Union Leader proposed to succeed. But intending the natural consequences of acts which are in all respect lawful, does not constitute the 'exclusionary intent,' that is a prerequisite for finding a violation of Section 2. In other words, a natural monopoly market does not of itself impose restrictions on one who actively, but fairly competes for it, any more than it does on one who passively acquires it. *In either event, there must be some affirmative showing of conduct from which wrongful intent can be inferred.* See *United States* v. *Griffith*, 1948, 334 U. S. 100, 105-108, 68 S. Ct. 941, 92 L.Ed. 1236; *United States* v. *United Shoe Machinery Corp.*, D.C.D. Mass. 1952, 110 F. Supp. 295, 297, 341, affirmed 347 U. S. 521, 74 S. Ct. 699, L. Ed. 910." 284 F.2d at 584. (emphasis supplied.)

However, Union Leader had joined with a union[1] engaged in a strike against Gazette and certain local merchants to induce other local merchants not to advertise in Gazette. The court affirmed the lower court's decision that this was a boycott and was conduct from which the necessary exclusionary intent could, indeed must, be inferred and affirmed the judgment against Union Leader on Gazette's counterclaim. However, the trial court had held that when the Gazette granted secret discriminatory concessions to advertisers as a defensive measure, the court had to infer a wrongful exclusionary intent because the Gazette knew that the market would not permit two to survive and thus it constituted an attempt to monopolize—to preserve its existing natural monopoly. Consistent with its holding as to Union Leader's conduct quoted above, the First Circuit reversed on this point:

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[1] Despite the name, there was no connection.

"We do not think the fact that competition is in a natural monopoly climate can limit a defendant's right to defend itself. We have already pointed out that Union Leader was not restricted by this circumstance. What is sauce for the goose is sauce for the gander, and, while there may be two different flavors, the stock is the same. In the one situation we have recognized that entry into a monopoly market without more does not taint otherwise legal conduct; now we are saying that the existence of such a market cannot circumscribe conduct which might otherwise be justified as defensive. Essentially, we refuse to permit the inevitable monopoly to give either competitor a fortuitous advantage. However, contrary to this, the court ruled, in effect, that a company which resorts to unfair practices in its attempt to win a natural monopoly area will be less open to repulse than one which enters a normal competitive field." 284 F.2d 587.

Petitioner attempted to get the court below to hold—and now would have this court hold—that an intent to succeed in a natural monopoly market requires an inference of unlawful intent. This is what the First Circuit expressly held was not the law and what the court below similarly held was not the law. Here, additionally, we have a jury finding that the intent did not exist.

The decisions in the court below and in *Union Leader* are also consistent with the decision in *American Football League v. National Football League*, 205 F. Supp. 60 (D. Md. 1962). There, as here, the facts are complicated but the essence of the court's holding is shown at 205 F. Supp. 79:

" . . . It was obvious that Minneapolis-St. Paul could not support two teams, and the NFL wanted to have a successful team there. As in the case of Dallas, that was a business reason, different from an intent to destroy the new league. The evidence does

not support plaintiffs' contention that an intent to destroy the AFL was a predominant motive of defendants." 205 F.Supp. at 79.

The fact that Buckeye was a joint venture and entered into an agreement with Ohio Bell does not add weight to Lamb's argument. As was held in *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71 (9th Cir., 1969):

> "Not every agreement is *per se* 'in restraint of trade' within the meaning of section 1. See White Motor Co. v. United States, 1963, 372 U.S. 253, 261, 83 S.Ct. 696, 9 L.Ed.2d 738. Thus, it is well settled that it is not a *per se* violation of the antitrust laws for a manufacturer or supplier to agree with a distributor to give him an exclusive franchise, even if this means cutting off another distributor. [Citing authority]." 416 F.2d at 76.

The Court further said:

> "The proper line to be drawn, we think, is that stated by Barber in 'Refusals to Deal Under the Federal Antitrust Laws,' 103 U. of Pa.L.Rev. 847 (1955), at 876-877:
>
> " ' . . . The issue in these cases is not the existence or nonexistence of concerted refusal to deal but rather whether the purpose and effect of the operation of the contract, association, exchange or joint sales agency was such as unreasonably to exclude outsiders from participation in the trade in question. The principle of the group boycott cases—that it is prima facie unreasonable for a dominant group to combine to coerce—is not here applicable.' " 416 F.2d at 77-78.

In the two cases[2] cited by Lamb on this point it was the agreement reached by defendants which had the effect

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[2] *International Salt Co.* v. *United States*, 332 U.S. 392, 396, 68 S. Ct. 12, 92 L. Ed. 20 (1947).
United States v. *General Motors Corp.*, 384 U.S. 127, 146, 86 S. Ct. 1321, 16 L. Ed. 2d 415 (1966).

of excluding prospective competitors. In the case at bar economically there could be only one entrant and it is that economic fact which excluded Petitioners. It is undisputed that Bell stood ready at all times to serve Petitioners.

To accept Lamb's argument would be to hold that in all natural monopoly situations the successful competitor has committed, by virtue of his success, a *per se* violation of the antitrust laws. Such a result would completely inhibit the very competition encouraged by these laws.

There is a suggestion that Lamb was "excluded" from any business in Toledo. On the contrary, Bell at all times stood ready to build all that Lamb had requested and this could have been expanded, had Lamb chosen to risk the venture, into a viable business in an area which Buckeye never entered.

2. IT WAS NOT ERROR TO EXCLUDE EXHIBIT 43 DEALING WITH LEGISLATIVE MATTERS WHICH THE TRIAL COURT FOUND WOULD PREJUDICE THE DEFENDANTS.

The trial judge in the court below excluded Exhibit 43 on the ground that its admission would be unduly prejudicial to Respondents (A. 68). The exhibit is a letter written by an attorney for Cox and sent to Buckeye's attorneys and to Marcus Bartlett, Vice President of Buckeye and Executive Vice President of Cox. The subject matter of the letter deals with a possible approach to the Toledo City Council to seek the enactment of an ordinance which would prohibit companies from engaging in the CATV business in Toledo without having received a permit from the council.

This letter considers an attempt to secure the passage of legislation. The attempt to secure the passage of legislation is constitutionally protected and cannot, as a matter of law, serve as the basis for a private antitrust suit

Eastern Railroad Presidents' Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961). In *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), this Court said, by way of dictum in a footnote, that it would be within the province of the trial judge to admit evidence of lobbying activities "if he deemed it probative and not unduly prejudicial." The trial judge determined that the admission of Exhibit 43 would be unduly prejudicial to Respondents (A. 68). This holding is reinforced by the fact he admitted all other exhibits offered by Petitioners on this point.

The decision of the trial judge was consistent with the holding in *United States v. Johns-Manville Corp.*, 259 F. Supp. 440 (E.D. Pa. 1966), in which the court stated:

> "Relying on footnote 3 to the *Pennington* opinion, the Government contends that even though J-M's activities with respect to local specifications are lawful in themselves, evidence of such activities may be used to establish anti-competitive intent, * * * On the other hand, not only is it illogical to infer from evidence that J-M engaged in certain completely lawful conduct that it also engaged in other conduct which was unlawful, but it would seem that to draw such an inference in this case would be an infringement upon the defendant's First Amendment right (*Cf. Bates v. City of Little Rock*, 361 U.S. 518, 80 S. Ct. 412, L.Ed.2d 480 (*sic*) (1960). It is noted that none of the cases cited by the Government . . . or by the Supreme Court in footnote 3 of the *Pennington* case involved a situation in which predatory intent was inferred from participation in constitutionally protected activities." 259 F. Supp. at 453.

Under *Noerr*, the contemplated attempt to secure the passage of legislation discussed in Exhibit 43 was perfectly legal. To permit the jury to infer from it that other lawful acts were done with an unlawful intent would be highly

prejudicial. The decision of the court to exclude Exhibit 43 as prejudicial is consistent with the constitutional protection afforded to lobbying activity and was not an abuse of discretion. In any event, its exclusion does not constitute prejudicial error since it was cumulative of the six exhibits and oral testimony on this point.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorary should be denied.

Respectfully submitted,

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